UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	COMPLAINANT'S RESPONSE TO RESPONDENT'S OPENING BRIEF
Respondent.	

COMES NOW THE COMPLAINANT in the above-entitled matter, the United States Environmental Protection Agency, Region 9 ("EPA") by its counsel of record, David M. Jones, in response to the Respondent's Opening Brief filed in the above-entitled matter.

I. Statement of the Case

Complainant adopts the statement of the case as set forth in the Introduction to the Post Hearing Brief dated April 14, 1997, filed by Complainant in the above-entitled matter beginning on page 1 and ending on the top of page 4 thereof.

In the Preliminary Statement, Part I of Respondent's Opening Brief, Respondent proclaims that "[l]iability is admitted."[1] The word "liability" is generally understood to mean "responsible" or "answerable."[2] The statement is apparently a reaffirmation of the Order Granting Motion for Accelerated Decision As To Liability dated January 10, 1995. Respondent's words must mean that Respondent is acknowledging responsibility for, or that Respondent is answerable for, the violations of Section 313 of EPCRA[3] [42 U.S.C. § 11023] as charged in each of

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[1] Respondent's Opening Brief, Part I. Preliminary Statement, p.1.

[2] Webster's II New Reverside University Dictionary,p.689.

[3] In the first sentence of the Preliminary Statement on page 1 of Respondent's Opening Brief, Respondent uses an acronymn, EPRCA. At the top of page 2 of the Opening Brief, Respondent cites *In re: Apex Microtechnology, Inc.*(1993), Docket No. EPCRA-09-92-0007, for the proposition that to the extent Section 325(b)(2) of EPCRA serves as the criteria for assessing a civil penalty under Section 304 of EPCRA, Section 325(b)(2) is applicable in the same manner for violations of Section 313 of EPCRA. See *Apex* pp.11 and 12.

At the hearing Respondent referred to Section 325(b)(1)(C) of EPCRA as providing the statutory criteria for penalty assessment. See Transcript at 12 to 16, and Respondent's Exhibit R-1. The discussion in *Apex* makes it clear that Section 325(b)(1)(C) is not the applicable criteria for assessing penalties prescribed by Section 325(c) as claimed by Respondent. See also *In re: Pease And Curren, Inc.*(1991), Docket No. EPCRA-I-90-1008,pp.10-12. The factors in 325(b)(1)(C) are the same as those in Section 16(a)(2)(B) of TSCA the difference lies in the rational for using

the seven counts in the Complaint and Notice of Opportunity for Hearing (hereinafter "Complaint").

At the end of the Preliminary Statement Respondent proclaims that "[u]nder the statutory criteria for the assessment of . . . penalties, no civil penalty is warranted," and "the imposition of a civil penalty would be unjust, and thus undermine the very law EPA Region IX seeks here to enforce and uphold."[4] Then, at the end of the Opening Brief, Respondent states "to penalize Catalina Yachts would not further compliance with the law. It would be unjust and would only promote the notion that our government is neither caring nor thoughtful."[5] However, Respondent provides no reason as to why the assessment of a civil penalty against Respondent would be unjust. That no bases for these statements

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the TSCA factors. See *infra* p.29 & note 45.

Complainant disclaims any responsibility for determining the meaning of the acronym, EPRCA, used by Respondent in the Opening Brief. Further, Complainant disclaims responsibility for determing the applicability of Section 325(b)(1)(C) as the criteria for determing the civil penalty in the instant action. On the basis of the disclaimers set forth above, Complainant urges the Trier of Fact to strike all references in Respondent's Opening Brief to the acronymn EPRCA and to Section 325(b)(1)(C) wherever cited as the statutory criteria for penalty assessment.

[4] *Id.n.1.*

[5] *Id.n.1*,p.17.

is found in the Brief, compels the conclusion that the statements are made by Respondent solely for the purpose of arousing the sympathy of the Trier of Fact.

The statutory authority for the assessment of penalties for a violation of Section 313 of EPCRA is found at Section 325(c)(1) of EPCRA which reads in pertinent part:

> (1) Any person . . . who violates any requirement of section . . . 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

Complainant contends that the language in Section 325(c)(1) of EPCRA, a strict liability statute, is to be given a common sense interpretation and that the words enacted by the Congress mean just what they say.[6] Accordingly, if by their statement in the Opening Brief, "[l]iability is admitted," Respondent is admitting liability for failure to file Form Rs, as charged in the Complaint, then, Section 325(c)(1) above, makes appropriate

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[6] As the Supreme Court has stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation(1987)*, 484 U.S. 49 at 56, quoting *Consumer product Safety Comm's v GTE Sylvania, Inc.*(1980), 447 U.S. 102, 108. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc.*, 447 U.S. at 108. If the intent of the Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v Natural Resources Defense Council*(1984), 467 U.S. 837, 842-43.

the assessment of a civil penalty. Respondent's arguments in the Opening Brief set forth above, that no penalty should be assessed against Respondent for failure to file the Form Rs, is contrary to the obvious meaning of the words from Section 325(c)(1) above and for that reason alone should be rejected.

II. Respondent's Arguments Favoring No Penalty.

a. Respondent didn't know EPCRA existed.

At the end of the direct testimony of Respondent's sole witness at hearing, Gerald Bert Douglas, Vice President and chief of engineering at Catalina Yachts,[7] the witness was asked to "simply explain to the Court[Sic] why Catalina Yachts did not file Form Rs for the years in question with regard to its Woodland Hills' facility."[8] The response which followed was "[m]ainly because I didn't know about it."

b. Respondent complied with California and local requirements.

Mr. Douglas testified that prior to the inspection by EPA in November of 1993, he knew of only two agencies that required reports regarding chemicals on the Respondent's premises, the

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[7] Transcript at 79, lines 11 to 14.

[8] Transcript at 119, line 25; and Transcript 120 lines 1 to 7.

Hazardous Materials Division of the County of Los Angeles and South Coast Air Management District.[9] Examples of the reports submitted to these agencies were made a part of the record and designated Respondent's Exhibits 3, 4 and 5, respectively.

Mr. Douglas testified that it was his assumption that EPA charged South Coast Air Quality Management District with the enforcement of U.S. Environmental Protection Agency regulations. This was to suggest without saying that Mr. Douglas believed that when he complied with the South Coast Air Quality Management District's directives he was satisfying the mandate charged to the U. S. Environmental Protection Agency by the Congress of the United States, including EPCRA.[10]

In summary, Respondent believes that no penalty should be assessed against Respondent in this administrative action because their submission of reports to the Hazardous Materials Division of the County of Los Angeles and the South Coast Air Quality Management District, represented by Respondent's Exhibits R-3, 4 and 5, respectively, satisfied Respondent's obligation to submit the Form Rs as required by Section 313 of EPCRA.

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[9] Transcript at 82, lines 3 to 13.

[10] Transcript at 87, lines 7 to 11.

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c. Application of ERP/statute adjustment factors eliminates civil penalty.

Respondent has given consideration to a selection of factors taken from the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (1986) and Section 6607 of the The Pollution Prevention Act (1990) (hereinafter ("ERP") and purportedly from EPCRA that result in the conclusion that no penalty should be assessed. With respect to the attitude factor from the ERP, Respondent would grant themselves a 30% reduction of the proposed civil penalty set forth in the Complaint of $175,000 even though it was stated throughout the hearing that the proposed civil penalty would be $162,500 after considering the adjustment for the delisting of acetone.

In their Opening Brief Respondent lumps together four factors identified as statutory guidelines,[11] nature, circumstances, extent and gravity of the violation and take another 30% reduction in the proposed civil penalty prior to

[11] Opening Brief,p.14.

adjustment for the delisting of acetone.[12]

History of prior violations is a factor that is discussed in Section 16(a)(2)(B) of the Toxic Substances Control Act("TSCA"), as amended and the ERP. Respondent takes another write-down of 15% for the history of prior violations factor.[13] At this point Respondent has reduced the proposed penalty by 75%.[14]

d. Equity provides a credit which eliminates penalty assessment.

Through the testimony of their sole witness at hearing, Respondent presented extensive testimony regarding the various projects undertaken by Respondent purportedly in the interest of the environment. In their Opening Brief Respondent presents figures which purportedly represent the costs voluntarily incurred as environmentally beneficial expenditures both in the past and for the future.[15]

The only clue to the manner in which Respondent would apply

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[12] Opening Brief,p.15.

[13] Opening Brief,p.15.

[14]

Attitude--Opening Brief, p.14	30%
Statutory Guidelines--Opening Brief, p.14	30%
Prior History of Violations--Opening Brief, p15	15%
	75%

[15] Opening Brief,p.16.

the costs of their environmentally beneficial expenditures is found in the heading on page 16 of the Opening Brief as "Such Other Matters as Justice Requires," but, generally expressed as "such other matters as justice may require."

Undaunted by reality, Respondent would apply the justice factor to reduce the civil penalty to be assessed to zero. The credit to the proposed civil penalty of $175,000, that Respondent claims is in excess of $400,000, as shown in Part VI, the conclusion to their Opening Brief. Respondent has provided no detail in support of their justice claim.

III. Complainant's Arguments Favoring Penalty Assessment.

a. Everyone is deemed to know the law.

Respondent's argument that the penalty should be reduced because Respondent was not aware of EPCRA and that Respondent's violation of EPCRA was unintentional is without merit because Respondent is charged with knowledge of the law and should have been aware of the requirements of EPCRA.

It is well settled law that all persons are charged with knowledge of United States codes as well as regulations and rules promulgated thereunder and published in the Federal Register. 44 U.S.C. § 1507; *Federal Crop Ins. v. Merrill*, (1947), 332 U.S. 380, 384-385; *T.H. Agriculture and Nutrition Co.* (1984), TSCA

VII-83-T-191, p.11; *Colonial Processing, Inc.* (1991), Docket No. II EPCRA-89-0114, pp. 20-21; *Riverside Furniture*, p.5.

Further, the fact that Respondent was unaware of EPCRA does not provide a basis to reduce a penalty. Apex Microtechnology (1993), Docket No. EPCRA-09-92-00-07, p.18. EPCRA was enacted into law in 1986, almost seven years before the inspection which led to the filing of the Complaint.[16] Since that time EPA has conducted workshops as EPCRA outreach.

Based upon the outreach programs by EPA, Respondent should have known the reporting requirements of EPCRA. *Riverside Furniture*, p.7. (The success of outreach programs is predicated on what the respondent should have known as a result of outreach efforts.) "The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Riverside Furniture, p.7,n.2.*

In addition, public policy requires that a penalty not be reduced on the basis of a respondent claiming to be ignorant of the law. Such reductions would encourage ignorance of the law and should be avoided. This is especially true with regard to Respondent whose place of business is located in a suburban Los

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[16] Exhibit A,p.3 ¶7, and Exhibit 2.

Angeles community.[17] Los Angeles County is a major metropolitan area providing immediate communications with the world on every level.

Since the enactment of EPCRA, EPA has conducted numerous EPCRA Workshops in the Los Angeles and Burbank areas. Either location is close to the Woodland Hills facility. Notices of the workshops were mailed out to companies like Respondent who had more than 100 employees by EPA every year beginning in 1987 and continuing at least through 1995. The database maintained by EPA shows that Respondent was on the mailing list for these mailings at least in 1987 and 1993.[18] Respondent apparently ignored the Workshop announcement on a consistent basis. Therefore, no penalty reduction should be made on the basis of Respondent's lack of knowledge of EPCRA.

b. Compliance with other environmental laws does not support a reduction in penalty.

Respondent has argued that the penalty should be reduced in this matter based on Respondent filing reports with local agencies on the use of resins containing styrene, the use of

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[17] Transcript at 79, lines 1 to 10.

[18] Exhibit A,p.9,¶17.

acetone and air emissions resulting from such use.[19] In support of these claims Respondent has submitted to Complainant and entered as an exhibit on the record of this proceeding a document marked as Exhibit R-3 which was submitted to the Los Angeles City Fire Department by a letter dated February 20, 1989, signed Brian Parker, Catalina Yachts.[20] In addition, two other documents submitted to South Coast Air Quality Management District covering Respondent's emissions data for the years 1988 and 1989 were entered on the record as Exhibit R-4 and R-5, respectively. According to Respondent the forms submitted to the Fire Department and the Air Quality Management District provided similar information as that required on Form Rs under EPCRA.

Section 313 of EPCRA requires the submission of data that is chemical specific. The information submitted on the Form Rs is not only chemical specific but, includes releases to air (fugitive and stack), water and land, and treatment on site and transfers off site.[21]

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[19] See Respondent's Exhibits R-3, 4 and 5.

[20] Transcript at 19, lines 24 and 25, Transcript at 20, lines 1 to 3, Transcript at 21, lines 20 to 25, Transcript at 22, lines 1 to 15.

[21] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

The testimony of Complainant's witness, Dr. Pam Tsai, shows that with respect to Exhibit R-3, releases to air, water or land are not shown. In addition, R-3, unlike Form R, does not provide information as to waste management practices at Respondent's Woodland Hills facility or information with respect to off-site treatment, recycling or disposal of the chemicals.[22]

As for Exhibit R-4, the information reported in this exhibit is limited to releases to the air. In addition, the information given is limited to organic gases. The Exhibit R-4 form contains no information which will inform the public as to the releases of styrene.[23]

The information submitted by Respondent on Exhibit R-5 does not provide the same information as the Form R. The form contains information regarding styrene emissions, but is silent as to acetone emissions.[24]

The information submitted by Respondent in lieu of the Form Rs does not contain the comprehensive information that is to be reported under Section 313 of EPCRA. The information provided is

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[22] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

[23] Transcript at 49, lines 23 to 25, at 50, lines 1 to 4.

[24] Transcript at 50, lines 5 to 17.

not compiled in a national database made available to the public. Compliance with other environmental laws such as the laws of the State of California or local agencies, does not relieve Respondent of its obligation to comply with EPCRA, nor does it provide a basis for reduction or mitigation of the penalty. *In re: Apex Microtechnology, Inc.* (1993), Docket No. EPCRA-09-92-00-07, pp. 5-6; *In re: Pacific Refining Co.* (1994), EPCRA Appeal No. 94-1, pp. 18-19 and n.19.

In *Apex*, respondent submitted reports to an air district providing information regarding annual usage of the same chemicals that it was required to report on under EPCRA. *Apex*, p.5. *Apex* argued, as Respondent here, that although it did not file its Form Rs, it did in fact disclose the equivalent information. *Apex*, p.6. The tribunal deciding that action rejected the argument and held that "there is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities." *Apex*, p.14. see also *Pacific Refining Co*, p.19 and n.19.

Further, Section 313 of EPCRA requires that Respondent provide the information to EPA and to the State of California, not just to local agencies. see e.g. *Pacific Refining Co.*,pp. 18-19. Congress recognized that EPCRA would collect information

that might have already been reported under other environmental laws, but passed EPCRA so that the information would be comprehensive and easy to access by the general public. In the debate on the bill that became EPCRA, Senator Lautenberg stated: "The information maybe scattered in air files, water files, and on RCRA manifest forms, for example, but not pulled together in one place to provide a complete usable picture of total environmental exposure." 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (statement of Sen. Lautenberg).

Thus, no reduction in the penalty should be made by the Trier of Fact based upon the fact that Respondent filed other reports with local agencies.

c. Application of the ERP/statutory adjustment factors do not preclude the assessment of a civil penalty.

1. Factors Related to the Violation.

The applicable statutory factors are found in Section 16 of the Toxic Substances Control Act (TSCA), as amended[25] [15 U.S.C.

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[25] With respect to civil penalties under EPCRA, Section 325(b)(2) of EPCRA [42 U.S.C. § 11045(b)(2)] provides in part:

> Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

§ 2615] which draws a distinct demarcation between factors relating to the violation itself and factors relating to the violator. For the violation itself, Section 16 of TSCA provides that in determining the amount of the civil penalty EPA must take into account the "nature, circumstances, extent and gravity of the violation or violations." [15 U.S.C. § 2615(a)(2)(B)]. The meaning of each of these terms will be explored in turn.

The commonly understood meaning of "nature" is the most appropriate interpretation. Webster's New World Dictionary defines nature as "[t]he essential character of a thing; quality or qualities that make something what it is; essence . . ." . As the U.S. Environmental Protection Agency noted in its 1980 TSCA penalty policy, "the nature (essential character) of a violation is best defined by the set of requirements violated." 45 Fed.Reg. 59770, 59771.

In this case, the nature of the EPCRA violations was the Respondent's failure to provide timely, complete and accurate information to EPA and the State of California as required by Section 313 of EPCRA [42 U.S.C. § 11023].[26] Except for 1992, Respondent filed each of the Form Rs required by the statute over

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[26] Transcript at 13, lines 8 to 25.

one year after the date that the same were due and after the November, 1993, inspection during which the Respondent's non-compliant status was uncovered.[27] The Form Rs for 1992 were filed eleven months after the date the same were due. Respondent's failure to provide the Form R information in a timely manner deprived the public of information on the use and releases of chemicals in the community and, consequently, deprives both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could result in increased risk to the local community.

"Circumstances" is reasonably interpreted in the context of the TSCA penalty assessment factors as reflecting the probability of harm occurring as a result of the violation. See 45 Fed. Reg. 59770, 59772. Under Section 313 of EPCRA the circumstances of the violation "takes into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the State of California and to the Federal government." ERP, p.8. The circumstances of the violations in this case is the failure to report in a timely

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[27] Exhibit A,p.7¶15.

manner.[28] This is the most significant of the violations of Section 313. Failure to report is classified as the most serious violation of Section 313 of EPCRA because such failure deprives the public of information on chemical releases which may have a significant affect on public health and the environment. In the case at bar toxic release information for the year 1988, Counts I and III, was not made available to the public for approximately five years.

The natural meaning of the term "extent" suggests a consideration of the degree, range or scope of a violation. In the context of Section 313 of EPCRA, EPA interprets this "extent" to take into consideration the quantity of a listed toxic chemical a facility processes, manufactures or otherwise uses. Facilities such as Respondent that process, manufacture or otherwise use ten or more times the reporting threshold for the Section 313 chemicals create a greater potential of exposure to the employees at the facility, the public and the environment. The amount of toxic chemicals processed, manufactured or otherwise used should be considered in assessing a penalty under EPCRA because the major goal and intent of EPCRA is to make

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[28] Transcript at 16, lines 1 to 9.

available to the general public, on an annual basis, a reasonable estimate of the toxic chemicals emitted into their local communities from regulated sources.[29] ERP, p.9.

Another factor in determining the extent of the violation is size of the respondent's business. The size of the respondent's business reflects the proposition that a smaller penalty will have the same deterrent effect on a small company, as a large penalty on a larger company. Respondent has more than 50 employees and at the time the Complaint was filed had annual sales of approximately $40 million.

The common sense meaning of "gravity" in the context of penalty assessment is the overall seriousness of a violation. In both TSCA and the ERP, EPA interprets "gravity" as a composite of other factors. For violations of Section 313 of EPCRA it is reasonable to view gravity as incorporating the considerations under the extent and circumstances elements of the violations.[30]

In their Opening Brief, Respondent's consideration of these factors is found on pages 14 amd 15. The nature, circumstances, extent and gravity of the violations are factors to be considered

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[29] Transcript at 30, lines 13 to 22.

[30] Transcript at 31, lines 12 to 17.

in determining the amount of civil penalty. These factors are irrelevant to and misapplied by Respondent to achieve penalty mitigation. Respondent's consideration of these factors does not distinguish factors pertaining to the violation from factors pertaining to the violator. In fact, Respondent's discussion under a heading listing these factors doesn't relate the factors to any element of the case. Nevertheless, Respondent concludes at the end of a discussion that the Presiding Administrative Law Judge can only determine to be irrelevant, that Respondent is entitled to a diminution in the civil penalty of thirty percent.

For the reasons stated above, Complainant contends that the factors related to the violation were considered and applied properly in determining the proposed civil penalty.

2. Statutory Adjustment Factors That Relate To The Violator.

Section 16 of TSCA also requires the consideration of factors pertaining to the violator. These factors include: "Ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." [15 U.S.C. § 2615(a)(2)(B)]

Ability to pay generally encompasses a review of a

violator's solvency and an assessment of the effect a given penalty will have on the firm's ability to continue in business. However, in an order by the Presiding Administrative Law Judge[31] rescinding an order whereby Complainant sought financial information to determine Respondent's ability to pay, Respondent stated that it was not raising ability to pay as a defense to the proposed penalty.[32] The order then stated ". . . the only reasonable interpretation of Catalina's assertion is that it is a waiver of 'ability to pay/inability to pay' as a defense to the penalty sought by Complainant . . ." .[33] No evidence has been presented to date by Respondent regarding Respondent's ability to pay the proposed civil penalty or that payment of the proposed civil penalty would in any way impair Respondent's ability to continue in the boat building business.

While Respondent does not have any history of prior violations of EPCRA, on page 15 of the Opening Brief, Respondent seeks a reduction in the proposed civil penalty of fifteen percent. Downward adjustments under this factor are not

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[31] Order Rescinding Discovery Order dated April 1, 1996.

[32] *Id.*p.4.

[33] *Id.*

permitted. See, *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4,p.27,n28; See also, Pacific Refining Company (1994), EPCRA Appeal No. 94-1,p.11; In re: Apex Microtechnology, Inc (1993), Docket No. EPCRA-09-92-0007,p.16; In re: K-I Chemical U.S.A., Inc.(1995), Docket No. TSCA-09-92-0018,p.24.

EPCRA has been determined to be a strict liability statute; thus, culpability is considered only when there is evidence that Respondent knowingly violated EPCRA. *Riverside Furniture*, Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, p.5,n.2. (Intent is not an element of an EPCRA civil violations); see also ERP, p.14 ("Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA . . . ."). There is no evidence that Respondent's violations were knowing or willful. Although EPA considered the statutory factors of Respondent's ability to pay, effect on ability to continue to do business and culpability, in the case at bar, no adjustment was made by Complainant in the proposed civil penalty based upon these factors because they were determined by EPA to be inapplicable to Respondent. It is inappropriate to apply a downward penalty adjustment for culpability.

On page 15 of their Opening Brief, Respondent has comments

under the heading Economic Benefit Resulting From the Violation. Economic Benefit to Respondent is not a statutory factor. However, continuing the comment made by Respondent regarding David B. Wright, who was hired by Respondent to prepare the late Form Rs, who had a good working rapport with Respondent's witness, who was employed by the consulting firm named Encom as shown by the letter of transmittal accompanying Respondent's Exhibit R-5, but was never called upon to advise Respondent's witness, an officer of the Respondent corporation, on Respondent's obligations under EPCRA and other Federal environmental laws.[34]

The final factor in the category of statutory factors to be considered is "other matters as justice may require." On page 16 of the Opening Brief, Respondent's brief comments covering this factor are found under a heading which reads "Such Other Matters as Justice Requires."

It is the general practice at EPA to apply this factor during settlement negotiations.[35] To assure national consistency the ERP has provided guidance in assessing issues which may

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[34] Transcript at 98, lines 15 to 25.

[35] Transcript at 34, lines 14 to 20, and Transcript at 37, lines 5 to 18.

qualify as "other factors as justice may require." The ERP factors include: new ownership for history of prior violations, borderline violations and lack of control over the violation. In the case at bar Respondent's violations are not due to a new ownership for history of prior violations. Nor are the violations borderline since Respondent used acetone and styrene at quantities well over ten times the reporting quantity threshold[36] and had over 200 employees at the time of the inspection,[37] versus 10 employees for the number of employees reporting threshold.[38] Nothing on the record in this action shows that Respondent had less than total control over the violations. The ERP warns that "[u]se of this reduction is

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[36] The following is a summary of usage and threshold taken from the Complaint:

		Acetone Used	Styrene Processed
1988	approx.	308,106 pounds	1,784,078 pounds*
1989	approx.	101,655 pounds	2,691,348 pounds**
1990	approx.		898,416 pounds**
1991	approx.		624,441 pounds**
1992	approx.		660,798 pounds**
Threshold		10,000 pounds	*50,000 pounds **25,000 pounds

[37] Transcript at 81, line 7.

[38] Section 313(a) [42 U.S.C. § 11023(a)].

expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file."[39]

At hearing Respondent presented extensive evidence of projects undertaken by Respondent which were represented as environmentally beneficial expenditures. The relationship of these projects to the violations charged against Respondent in the Complaint was not made clear at the hearing. Complainant was left to surmise the application of Respondent's testimonial evidence.

Complainant contends that the evidence of past projects by Respondent presented at hearing fails to meet the evidentiary requirements discussed in *In re: Spang & Company* and for that reason may not be considered under the justice factor in determing the amount of the civil penalty to be assessed.[40]

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[39] ERP,p.18.

[40] "Whether a project warrants a penalty adjustment, and if so, how much, will of course depend upon the evidence in the record. If a respondent claims that justice requires consideration of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures. The snapshot provided by the evidence in the record will provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much. Absent such evidence, there is no factual basis for concluding that the calculated penalty will produce an injustice." *Spang & Company*, p.61.

Respondent has compounded the evidentiary failure in their Opening Brief by presenting proposed adjustments as percentages and dollars without explanation as to how the percentages or dollars were determined. For example: On page 16 of the Opening Brief Respondent has set forth dollar amounts which are to be used in adjusting the civil penalty. No creditable evidence was given as to how Respondent arrived at these amounts.

For the reasons stated above, Complainant contends that all the statutory adjustment factors related to the violator were properly considered and applied in determining the proposed civil penalty and no penalty adjustment should be granted to Respondent.

3. EPA Also Considered The Adjustment Factors In The ERP.

In addition to the statutory factors, in assessing a penalty EPA also considers it appropriate to weigh several additional adjustment factors under the ERP. These are: voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8.

The first adjustment factor, voluntary disclosure is not applicable to the case at bar because the violations were

discovered as a result of an inspection.[41] ERP, p.14.

The adjustment factor for delisted chemicals is applicable in this case. Acetone was delisted effective June 16, 1995, and the fixed reduction percentage in the proposed civil penalty taken from page 17 of the ERP, 25% is applicable[42] even though Respondent has used the proposed civil penalty shown in the Complaint in their Opening Brief. Complainant urges the Trier of Fact to determine that the proposed civil penalty in this action is $162,500 after adjustment for the delisting of acetone.

The supplemental environmental project ("SEP") adjustment is limited in its application by Complainant to settlement discussions.[43] An SEP was never accomplished by the parties because an SEP was never presented to Complainant by Respondent for consideration and evaluation.

In their consideration of the adjustment for attitude beginning on page 13 of the Respondent's Opening Brief, Respondent would credit themselves with 30% of $175,000 or

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[41] Transcript at 58, lines 3 to 11.

[42] Transcript at 54, lines 2 to 10, and Transcript at 73, lines 1 to 6.

[43] Transcript at 37, line 25, and Transcript at 38, lines 1 to 25, and Transcript at 54, lines 11 to 20.

$52,500. The attitude adjustment factor with its two components, cooperation and compliance, was not applied in calculating the proposed civil penalty set forth in the Complaint because of Complainant's practice of considering application of the factor during the course of settlement discussions. Complainant believes that the speed and completeness with which Respondent comes into compliance as well as the degree of cooperation and preparedness, including but not limited to, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by Complainant is best measured through the settlement process.

Respondent's generosity in awarding itself a $52,500 credit as an adjustment under the attitude factor overlooks Respondent's tardiness in supplying the EPCRA Inspector information regarding Respondent's useage and release of chemicals. The inspection at the Woodland Hills facility took place in November, 1993, however, the information requested by the inspector was not supplied by Mr. Wright, the person hired by Mr. Douglas to complete the Form Rs the day of the inspection[44], until May,

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[44] Transcript at 91, lines 3 to 21.

1994.[45] Mr. Douglas testified at the hearing that it would not have cost more than $200 to have Mr. Wright prepare the Form Rs.[46] Nevertheless, it took Respondent almost six months to submit the requested Form Rs. On the basis of Respondent's conduct in connection with the inspection and achieving compliance with EPCRA, Complainant urges the Trier of Fact to deny Respondent any credit under the attitude factor.

For the reasons stated above, Complainant contends that the adjustment factors in the ERP were considered and applied properly in determining the proposed civil penalty.

d. EPA Has Met The Burden That The Proposed Penalty Is Appropriate.

Section 22.24 of the Rules of Practice, 40 C.F.R. Part 22, places the burden of proof regarding the "appropriatness" of the penalty on Complainant. Judge Reich writing for the Environmental Appeals Board in *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.* said:

> The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it 'took into account' certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue. To

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[45] Exhibit 2 to Exhibit A.

[46] Transcript at 99, lines 3 to 5.

> satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16[47] was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

In re: Employers Insurance of Wausau And Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, p.33.

Complainant's initial burden, to prove the facts constituting the violations was met upon the issuance of the Order Granting Motion for Accelerated Decision dated January 10, 1995, signed by the Presiding Administrative Law Judge. The argument set forth in this Part III of Complainant's Response to Opening Brief clearly establishes that each factor enumerated in TSCA § 16(a)(2)(B) was actually considered in formulating the penalty proposed in the Complaint and how the proposed civil penalty as adjusted for the delisting of acetone follows from an application of the criteria set forth in Section 16(a)(2)(B) of TSCA to the violations charged in the Complaint. There is adequate evidence on the record of this proceeding to show that Complainant has satisfied

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[47] The penalty criteria set forth in Section 16(a)(2)(B) of TSCA applied in *Employers* is applicable to the instant action by virtue of Section 325(b)(2) of EPCRA which provides for Class II administrative penalties, and requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15.

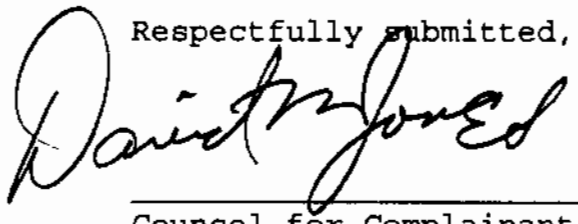
and sustained the initial burden of going forward imposed under Section 22.24 of the Consolidated Rules of Practice.

IV. Conclusion.

Based on the foregoing, it is respectfully requested that an Initial Decision issue in favor of Complainant and that a penalty of ONE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS be assessed against the Respondent.

Dated: May 14, 1997.

Respectfully submitted,



Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Complainant's Response To Respondent's Opening Brief was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (1900)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
Eileen M. Nottoli, Esquire
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5/14/97
Date

Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9